the provisions of the Civil Code.[13] The character of negotiability should be extended to mortgage notes[14] and bonds[15] and other instruments as suggested by Mr. Harrison in an article published recently in this Review.[16] This decision which marks one step towards uniformity should be the precursor of others along similar lines. *R. P.*

DAMAGES: MENTAL SUFFERING: EVIDENCE OF PLAINTIFF'S POVERTY.—The case of *Smith v. The Atchison, Topeka and Santa Fe Ry. Co.*[1] suggests an ever perplexing problem in the law of damages for personal injuries. Evidence as to the number and ages of the plaintiff's children was held not admissible for the purpose of proving mental suffering. While the cases are not in harmony as to the admissibility of such evidence, the weight of authority seems to be against it. However, the statements of the courts are often so broad as seemingly to sanction such evidence, and this viewpoint, which is supported by considerable authority, seems justly to demand careful consideration.

In recoveries for mental anguish or suffering, it is a basic rule that mental anguish must be either "direct" or, when "indirect", the proximate result of defendant's act. As a general rule, mental suffering is not of itself a cause of action; it is *damnum absque injuria.*[2] On the other hand, if it accompanies other injuries for which action traditionally lay, and is a proximate result, it is material damage.[3] The chief objection urged against the allowance of compensation for mental suffering was, once, that it was not capable of estimation in money; though that argument might equally have been urged against damages for physical pain. The law long since came to the view that mere difficulty in measuring damage to the feelings should not preclude compensation therefor in a proper case.[4]

---

[13] Supra, n. 5. See criticism of previous codification in article Law Merchant and California Decisions by Professor Kidd, 2 California Law Review, 377.

[14] The existence of mortgage security does not affect negotiability in other states where the act is in force; even in states where there is a similar provision to Cal. Code Civ. Proc. § 726. 8 C. J. 200 and cases there cited.

[15] Negotiability of Bonds in California, 6 California Law Review, 444.

[16] The Adoption of the Negotiable Instruments Law in California, 6 California Law Review 23.

[1] (Jan. 28, 1919) 57 Cal. Dec. 122.

[2] 5 Columbia Law Review, 182; Sutherland, Damages, (4th ed.), p. 339.

[3] Sedgwick on Damages, p. 920; Zibbell v. So. Pac. Co. (1911) 160 Cal. 237, 116 Pac. 513; Wheelock v. Postal Tel. Cable Co. (1908) 197 Mass. 152, 83 N. E. 313; Chicago City R. Co. v. Anderson (1899) 182 Ill. 298, 55 N. E. 366.

[4] Sedgwick on Damages, p. 72; Young v. Western Union Tel. Co. (1890) 107 N. C. 370, 11 S. E. 1044; Wadsworth v. Western Union Tel. Co. (1888) 86 Tenn. 695, 711, 8 S. W. 574; Ind. Ry. Co. v. Orr (1908) 41 Ind. App. 426, 84 N. E. 32; Walker v. Chanslor (1908) 153 Cal. 118, 94 Pac. 606; Elfers v. Woolley (1889) 116 N. Y. 294, 22 N. E. 548; Lyon v. Hancock (1868) 35 Cal. 372.

A loss immediately resulting from an act is a direct loss; one resulting mediately in an "indirect" or "consequential" loss, and this may be one step or a dozen in the line of causation from the initial act. If so near that the law concerns itself with the connection, it is a "proximate" loss; otherwise, it is a "remote" loss. When, then, shall it be said that a consequental damage is proximate and when remote? Of course, any physical injury, whether immediately or mediately caused by the defendant's act, may itself branch out into a network of physical and mental and social subresults. Now, when the initial physical result is a "direct" consequence of defendant's act, the law makes no distinction between all these ramifying sub-consequences; all are "proximate", i. e., none are disregarded by the law. But if the same initial physical injury were indirectly caused, then some of the sub-consequences are excluded, as "remote". Whether a particular indirect harm to plaintiff is a proximate result of defendant's act is a question for the jury to be determined by them from a knowledge of all the circumstances.[5]

The courts have come to recognize that peace of mind is as much a legal right as freedom from physical interference.[6] To merit recovery it is not even necessary that the suffering should have originated simultaneously with the physical injury, if it is the proximate result of this.[7] The courts are, however, divided in deciding what mental suffering is to be considered proximate. Thus, mental anguish for which recovery may be had is usually restricted to suffering arising from the injury to the person himself, as distinguished from suffering which comes from sympathy for another's suffering.[8] Again, a disabled plaintiff's anxiety about his own business has been held not to be a proper subject of recovery; but mental suffering from the consciousness that one has become incapable of earning a living has been held to be a proper ground for recovery.[9] Also, mental anxiety and distress,

---

[5] Tice v. Munn (1884) 94 N. Y. 621; Lake v. Milliken (1873) 62 Me. 240, 16 Am. Rep. 456; Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499, 111 Pac. 534.

[6] Sutherland, Damages, (4th ed.), p. 350; Larson v. Chase (1891) 47 Minn. 307, 50 N. W. 238; Sullivan v. Old Colony St. Ry. Co. (1908) 197 Mass. 512, 83 N. E. 1091; West v. Western Union Tel. Co. (1888) 39 Kans. 93, 17 Pac. 807; Fairchild v. The California Stage Co. (1859) 13 Cal. 599; Lawrence v. Housatonic R. R. Co. (1860) 29 Conn. 390; Linder v. Carpenter (1872) 62 Ill. 309.

[7] Sutherland, Damages, (4th ed.) p. 4663; Louisville & N. R. Co. v. Brown (1908) 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1135.

[8] Loomis v. Hollister (1902) 75 Conn. 275, 53 Atl. 579; Haupt v. Swenson (1904) 125 Ia. 694, 101 N. W. 520; Woodstock Iron Works v. Stockdale (1905) 143 Ala. 550, 39 So. 335; Linn v. Duquesne Borough (1903) 204 Pa. St. 551, 54 Atl. 341; Maynard v. Oregon R. & Nav. Co. (1904) 46 Ore. 18, 78 Pac. 983.

[9] Statler v. Geo. A. Ray Mfg. Co. (1909) 195 N. Y. 478, 88 N. E. 1063; Sedgwick on Damages, p. 66 and note.

which, though the proximate and natural result of the injury are independent of it, are subjects of compensation.[10]

It is very plain that where a visible primary physical injury that is "direct" has led to further physical or mental derangements, the law might well regard it as impracticable to draw a line between proximate and remote within this sphere of bodily health and ailments; but practicable to draw the line between what is proximate and remote, as respects consequences lying outside the body in the sphere of social complications, as, e. g., in cases of loss of employment. The problem presented in such cases as the principal case is a nicer one: the distinction of remoteness is drawn between results confined to the plaintiff's person, and results that are wholly mental. For sympathetic suffering due to plaintiff's thought of another's suffering or inconvenience, no recovery can be had; for "physical pain" that accompanies an injury to himself, he may recover; but query whether he should recover for his own "mental suffering", other than physical pain, that accompanies a physical injury?

In the instant case, the court approves the limitations set by Steinberger v. Cal. Electric Garage Co.[11] to the general language employed in Merrill v. Los Angeles Gas & Electric Co.[12] In the latter case, the court said: "Grief, anxiety, worry, mortification and humiliation, which one suffers by reason of physical injuries are component parts of the mental suffering for which admittedly damages may be awarded. It is meaningless to say that mental suffering must be that occasioned by physical pain, for then the latter phrase would alone be sufficient to convey the full meaning of the law. When the law says a recovery may be had for mental suffering, it must include the numerous forms and phases which mental suffering may take, which will vary in every case with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, and similar circumstances. Worry and anxiety over the future of his family would be a great element of mental suffering to a man dependent upon his own exertions for his support and their support."

Was this language and reasoning open to correction? As the opinion in the Merrill case showed the courts of this country are divided upon the question whether physical pain alone, or other mental suffering due to the injury, as well, should be recognized. The Merrill case took the more liberal view. Why is it not desirable? If this view of the subject is accepted and it seems that it well may be, should not evidence of plaintiff's poverty (which will include the size of his family) be admissible to show in-

[10] Procter v. So. Cal. Ry. Co. (1900) 130 Cal. 20, 62 Pac. 306; Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499, 111 Pac. 534; Webb v. Yonkers R. Co. (1900) 64 N. Y. S. 491.

[11] (1917) 54 Cal. Dec. 502, 168 Pac. 570.

[12] (1910) 158 Cal. 499, 512, 513, 111 Pac. 534, 540.

creased mental suffering? Most of the cases hold that such evidence is not admissible.[13] On the other hand where exemplary damages are claimed defendant's pecuniary ability is a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger means.[14] It has also been held in a few cases that plaintiff may show his own poverty or social condition to enhance exemplary damages.[15] If permitted in estimating exemplary damages, why not in estimating compensatory damages? Plaintiff has suffered mentally because of the injury and his poverty causes him greater mental suffering than he would otherwise have endured.

Attempts to widen the door have not been tolerated by most of the courts. However, in view of the general principles which the courts purport to follow, should they not be? In California the language of the Civil Code at sections 3282 and 3333 would seem to justify such a recovery. The legal prejudice against mental suffering as damages should not exist where the suffering is caused directly by the injury or is the natural and proximate consequence of it. Even the courts that deny recovery do not appear to be entirely satisfied with their own reasoning.[16] While damages for injury to the feelings are frequently too shadowy and speculative to be properly measured,[17] this is no reason for denying their recovery in all cases. The view urged is that these damages are compensatory, and that their amount should be left to the sound discretion of the jury.

M. H. V. G.

---

[13] Green v. So. Pac. Co. (1898) 122 Cal. 563, 55 Pac. 577; Johnston v. Beadle (1907) 6 Cal. App. 251, 253, 91 Pac. 1011; Mahoney v. San Francisco etc. Ry. Co. (1895) 110 Cal. 471, 42 Pac. 968; Chicago, B. & Q. R. R. Co. v. Johnson (1882) 103 Ill. 512; Central Rd. v. Moore (1878) 61 Ga. 151; Story v. Green (1913) 164 Cal. 768, 770, 130 Pac. 870, 871.

[14] Greenberg v. Western Turf Co. (1903) 140 Cal. 357, 73 Pac. 1050; Johnson v. Lamm (1910) 156 Ill. App. 287; Singer Mfg. Co. v. Bryant (1906) 105 Va. 403, 54 S. E. 320; Barkly v. Copeland (1887) 74 Cal. 1, 7, 15 Pac. 307, 310; Brown v. Barnes (1878) 39 Mich. 211; Hayner v. Cowden (1875) 27 Ohio St. 292; Cal. Civ. Code, § 3294.

[15] Press Pub. Co. v. McDonald (1894) 63 Fed. 238; Schmitt v. Kurrus (1908) 234 Ill. 578, 85 N. E. 261; Fay v. Parker (1872) 53 N. H. 342; Wirsing v. Smith (1908) 222 Pa. 8, 70 Atl. 906; Griser v. Schoenborn (1909) 109 Minn. 297, 123 N. W. 823.

[16] Homans v. Boston Elevated Ry. Co. (1902) 18 Mass. 456, 62 N. E. 737; Braun v. Craven (1898) 175 Ill. 401, 51 N. E. 657; Spade v. Lynn B. R. Co. (1897) 168 Mass. 285, 47 N. E. 88.

[17] Mahoney v. Dankwart (1899) 108 Ia. 321, 79 N. W. 134; Wyman v. Leavitt (1880) 71 Me. 227, 36 Am. Rep. 303; Fox v. Borkey (1889) 126 Pa. St. 164, 17 Atl. 604; Bovee v. Danville (1880) 53 Vt. 183, 190; Turner v. Great Northern Ry. Co. (1896) 15 Wash. 213, 46 Pac. 243.